be admitted that the two methods were occasionally used interchangeably.[19] Since the common law procedure in habeas corpus involved no jury trial, it is only by a confusion of procedure that the Chancellor on the return of the writ could have exercised his right to obtain an advisory verdict. Although most of courts inherit the powers of Chancery as well as those of the old English law courts,[20] some have flatly denied their discretionary right to call a jury,[21] and the failure of others to exercise such a right may have been due to doubts as to their power.[22] It is rather surprising, then, that the New York courts should adopt such a questionable inheritance from Chancery,[23] especially in view of the fact that a different practice had become well established in procedure on the identical writ in the courts of common law.

RES IPSA LOQUITUR.—Although it is often loosely said that the application of the maxim *res ipsa loquitur* raises a presumption of negligence against a defendant that casts upon him the burden of proof,[1] this must not be understood as making it necessary for him to show by a preponderance of evidence the exercise of due care. Whenever it becomes necessary to distinctly advert to the difference between establishing a counter proposition and merely meeting a *prima facie* case, the courts clearly point out that although the burden of going forward with evidence may shift in the course of a trial, the *onus probandi* must always remain upon the plaintiff throughout, and that the rule *res ipsa loquitur* by authorizing a certain method of proof

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[19]Kerly, History of Equity, 49-56.

[20]McQuigan *v.* Delaware L. & W. R. R. (1891) 129 N. Y. 50; Omaha Fire Ins. Co. *v.* Thompson, *supra.*

[21]State *v.* Farlee, *supra*; Garner *v.* Gordon, *supra.*

[22]In *Ex parte* Davis (1846) 18 Vt. 401, it was said that the objection to habeas corpus as a means of releasing a debtor would be valid if the facts relied upon produced an issue suitable for a jury. In *Ex parte* Mosby (1869) 31 Tex. 566 the court said "upon habeas corpus the court or judge trying the cause is judge of the law and the facts". In New York, however, a reference was ordered in circumstances similar to those of the principal case, Matter of Dixon (N. Y. 1882) 11 Abb. N. C. 118, and authority for a jury trial in habeas corpus is sometimes claimed from the case of People *v.* Burns (1894) 77 Hun 92, aff'd. 143 N. Y. 665, where a jury was summoned on an order to show cause after a discharge on habeas corpus.

[23]It might be noted that the petitioner in the principal case was in confinement under a summary commitment by the judge after acquittal on the grounds of insanity in a criminal trial. The constitutionality of the statute authorizing such commitment was sustained in People *v.* Chanler, *supra,* on the ground that it permitted of a subsequent hearing, and this may well have made the desirability of a jury trial on the subsequent habeas corpus appear greater. In fact, another state has specifically authorized a jury trial on the return of the writ of habeas corpus in these cases, Gen. Laws R. I., Rev. of 1909, c. 96, § 19,—the awarding of such trial being in the courts's discretion, *In re* Palmer (1904) 26 R. I. 222,—but no such provision appears in the New York Code.

[1]See Orcutt *v.* Century Building Co. (1907) 201 Mo. 424, 441; Ligon's Admr. *v.* Evansville Rys. (Ky. 1915) 176 S. W. 968, 970; Norfolk Ry. & L. Co. *v.* Spratley (1905) 103 Va. 379, 384.

does not change the ultimate burden at all.[2] Further than this, however, there still remains a divergence of opinion as to the strength of the presumption in question. On the one hand it is assumed that unless this has been completely and satisfactorily rebutted by the defendant, the plaintiff must prevail as a matter of law;[3] whereas on the other, the maxim is emphatically described as merely authorizing but not compelling the jury to draw an inference of negligence from facts which of themselves have no efficacy as proof thereof in that particular case.[4] The correct interpretation of the rule is that it gives rise to an inference or presumption of fact weighing against the defendant in the absence of explanation by him and entitled to greater or lesser consideration according to the character of the case.[5]

Although the courts have doubtless been influenced to a certain extent by the fact that the means of explanation lie peculiarly within the power of the defendant,[6] the rule is essentially a recognition of the teaching of common experience that an injury such as is not ordinarily occasioned by one who has taken proper precautions to guard the safety of others, probably has resulted from a failure of the person charged to exercise the care required of him.[7] Obviously the degree of this probability will be varied by the degree of care due to the plaintiff from the defendant as well as by the manner in which the injury is sustained. The plaintiff must always prove more than the mere fact of his injury in order to invoke the maxim. He must set forth a sufficient amount of the attendant circumstances to show that it was caused by some instrumentality under the control of the defendant,[8] and that at the time it was caused the defendant owed him a duty of care. When this has been done, it must be apparent to the court that the nature of the occurrence reasonably excludes all other inferences save that of the defendant's negligence.[9] In determining whether it does so or not it is proper to examine the relations of par-

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[2]Kay *v.* Metropolitan St. Ry. (1900) 163 N. Y. 447; Valente *v.* Sierra Ry. (1907) 151 Cal. 534; Briglio *v.* Holt & Jeffery (Wash. 1915) 147 Pac. 877; Lincoln Traction Co. *v.* Webb (1905) 73 Neb. 136. If, however, the court thinks it plain that the jury has not been misled by an instruction they will refuse to reverse even though the ambiguous term burden of proof was used. Cleveland etc. Ry. *v.* Hadley (1907) 170 Ind. 204; Cody *v.* Market St. Ry. (1905) 148 Cal. 90.

[3]Osgood *v.* Los Angeles Traction Co. (1902) 137 Cal. 280; Nagel *v.* Railroad (1912) 167 Mo. App. 284; Marceau *v.* Rutland R. R. (1914) 211 N. Y. 203.

[4]Palmer Brick Co. *v.* Chenall (1904) 119 Ga. 837; Sweeney *v.* Erving (1913) 228 U. S. 233; see Ridge *v.* Norfolk Southern R. R. (1914) 167 N. C. 510.

[5]1 Shearman & Redfield, Negligence, § 58a.

[6]See Bryne *v.* Boadle (1863) 2 H. & C. *722; 4 Wigmore, Evidence, § 2509.

[7]Graham *v.* Badger (1895) 164 Mass. 42; Scott *v.* London Docks Co (1865) 3 H. & C. *596.

[8]Eaton *v.* N. Y. C. & H. R. R. R. (1909) 195 N. Y. 267; Bigwood *v.* Boston & N. R. R. (1911) 209 Mass. 345.

[9]St. Louis S. F. & T. Ry. *v.* Cason (Tex. Civ. App. 1910) 129 S. W. 394; Dingman *v.* Merrill (N. H. 1915) 93 Atl. 664; *cf.* May *v.* Charleston Interurban R. R. (W. Va. 1915) 84 S. E. 893. And, of course, if the facts are equally consistent with the hypothesis of due care the plaintiff has no standing at all. 2 Columbia Law Rev., 125.

ties so as to discover the standard of diligence by which the case is to be measured. When the duty of utmost caution is on the defendant, as in the case where the contract relation of passenger and carrier exists,[10] the rule is, of course, most readily applied. But it is by no means necessary to find such an obligation,[11] for certain events may well be thought to bespeak the lack of even ordinary care.[12] Since, therefore, the phrase *res ipsa loquitur* is fundamentally nothing but an expression of inductive logic, there is no valid reason for denying, as has positively been done,[13] the possibility of its ever being applied to a controversy between master and servant. The recent case of *Missouri, Kansas & Texas Ry.* v. *Cassady* (Tex. Civ. App. 1915) 175 S. W. 796, states the sound view that *res ipsa loquitur* may be relied on between master and servant when the facts of the injury permit. The necessity for producing a case that forbids any inference of assumption of risk,[14] or the negligence of a fellow servant,[15] may tend as a matter of fact to reduce the number of instances in which *res ipsa loquitur* will be available in behalf of a servant, but certainly should not prevent its operation when a proper case is shown.[16]

JURISDICTION AND PROCEDURE OF STATE COURTS UNDER THE FEDERAL EMPLOYERS' LIABILITY ACT.—The principal changes wrought by the Second Federal Employers' Liability Act[1] in existing law, in addition to the entrance of the Federal government into a field heretofore occupied exclusively by common law or state legislation are: (1) the abolition of the fellow servant rule;[2] (2) the substitution of the rule of comparative negligence for that of contributory negligence;[3] and

[10]See Cleveland etc. Ry. *v.* Hadley (Ind. 1907) 16 L. R. A. [N. S.] 527, and note.

[11]1 Columbia Law Rev., 398.

[12]John *v.* Nor. Pac. Ry. (1910) 42 Mont. 18.

[13]Danner *v.* Wells (1915) 248 Pa. 105; Patton *v.* Texas & Pac. Ry. (1901) 179 U. S. 658; Chicago Tel. Co. *v.* Schulz (1905) 121 Ill. App. 573; 1 Beven, Negligence (3rd ed.) 130.

[14]Thompson *v.* California Cons. Co. (1905) 148 Cal. 35.

[15]Casey *v.* Wynatol Realty & Hotel Co. (1915) 153 N. Y. Supp. 389.

[16]Cochran *v.* Young-Hartsell Mills Co. (N. C. 1915) 85 S. E. 149; O'Connor *v.* Mennie (Cal. 1915) 146 Pac. 674; Marceau *v.* Rutland R. R., *supra*; Houston *v.* Brush (1894) 66 Vt. 331.

[1]Act of April 22nd, 1908, c. 149, 35 U. S. Rev. Stat. L. 65. Since the operation of the act is confined to employees of an interstate carrier while engaged in interstate commerce the act is constitutional. Second Employers' Liability Cases (1912) 223 U. S. 1.

[2]§§ 1 & 2. Devine *v.* C. R. I. & P. R. R. (Ill. 1914) 107 N. E. 595. See also N. P. R. R. *v.* Maerkl (C. C. A. 1912) 198 Fed. 1; Central R. R. *v.* Colasurdo (C. C. A. 1911) 192 Fed. 901, affirming 180 Fed. 832. The abolition of the fellow servant rule is recognized either expressly or impliedly in almost every decision under the act and the very plainness of the act itself forbids questioning.

[3]§ 3. Horton *v.* S. A. L. R. R. (1911) 157 N. C. 146; Bombolis *v.* Minneapolis & St. L. R. R. (Minn. 1914) 150 N. W. 385; Grand Trunk Western Ry. *v.* Lindsay (1914) 233 U. S. 42. But see Atchinson T. & S. F. Ry. *v.* Hines (C. C. A. 1913) 211 Fed. 264. Contributory negligence only goes to the diminution of damages. Fish *v.* C. R. I. & P. R. R. (Mo. 1914) 172 S. W. 340; White *v.* Central Vt. Ry. (1914) 87 Vt. 330; Neil *v.* Idaho & W. N. R. R. (1912) 22 Idaho 74.